No. 18-431

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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In the decision below, the court of appeals struck down the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) as "unconstitutionally vague." Pet. App. 5a. As a result, conviction of a commonly charged federal crime is now plain constitutional error in the Fifth Circuit. See *United States* v. *Lewis*, 907 F.3d 891, 894-895 (2018). The compelling separation-of-powers rationale for this Court's traditional practice of reviewing a lower-court decision that invalidates a federal statute, see Pet. 21-22, is magnified here by the abundance of important criminal prosecutions—both pending and final—in which the question presented is at issue. The high volume of litigation has produced a widespread, intractable, and growing circuit conflict in only a matter of months. See Pet. 22-24. Respondents offer no sound reason for the Court to nevertheless delay resolution of the question presented by passing up review of the decision below, which squarely and unqualifiedly holds Section 924(c)(3)(B)

to be unconstitutional. This Court should grant the petition for a writ of certiorari and decide this Term whether the Constitution in fact requires Section 924(c)(3)(B)'s invalidation.

A. This Court Should Grant Review In This Case To Address Section 924(c)(3)(B)'s Constitutionality

Respondents do not meaningfully contest that the question presented warrants this Court's review in an appropriate case. This is such a case. Indeed, it is the best case for allowing the full Court to provide the issue with the expeditious resolution that it needs. See Pet. 25-26.

1. This Court's conclusion that 18 U.S.C. 16(b)'s definition of "crime of violence" was unconstitutionally vague in *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), has "call[ed] into question" the many prosecutions that the government has conducted, is conducting, and would in the future conduct in reliance on the similarly worded Section 924(c)(3)(B), *id.* at 1241 (Roberts, C.J., dissenting). Since Section 924(c)(3)(B)'s enactment in 1986, prosecutors have frequently relied on it to prosecute some of the most serious violent offenders in the federal system. Pet. 24. Contrary to respondents' assertion (Br. in Opp. 13)* that the constitutional issue here "pertains only to a tiny fraction of 924(c) prosecutions," many Section 924(c) prosecutions involve manifestly violent conduct that does not technically fit Section 924(c)(3)(A)—including respondents' own conspiracy to rob multiple convenience stores with a short-barreled shotgun. Pet. 4-5; see Pet. 24-25 (collecting additional examples involving firebombing and kidnapping).

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* The briefs in opposition in this case are substantially identical; citations refer to Davis's brief in opposition.

The rapid nationwide proliferation of litigation on Section 924(c)(3)(B)'s constitutionality, which has resulted in divergent outcomes, illustrates beyond doubt that the question presented here is recurring and important. Even though the petition for a writ of certiorari in this case was filed a mere five months after *Dimaya*, four circuits had already addressed—and reached different conclusions on—whether Section 924(c)(3)(B) is invalid in light of that decision. Pet. 21-23; see Pet. App. 5a (invalidating Section 924(c)(3)(B)); *United States* v. *Salas*, 889 F.3d 681, 683 (10th Cir. 2018) (same), petition for cert. pending, No. 18-428 (filed Oct. 3, 2018); *United States* v. *Eshetu*, 898 F.3d 36, 37-38 (D.C. Cir. 2018) (per curiam) (same), petition for reh'g pending, No. 15-3020 (D.C. Cir. filed Aug. 31, 2018); see also *United States* v. *Barrett*, 903 F.3d 166, 182 (2d Cir. 2018) (upholding Section 924(c)(3)(B)), petition for cert. pending, No. 18-6985 (filed Dec. 3, 2018). Since the filing of the petition, two more circuits have addressed the question, and both have held—in conflict with the decision below—that Section 924(c)(3)(B) is constitutionally valid.

In *Ovalles* v. *United States*, the en banc Eleventh Circuit determined that Section 924(c)(3)(B) invites no constitutional vagueness concerns because it "prescribes a conduct-based approach, pursuant to which the crime-of-violence determination should be made by reference to the actual facts and circumstances underlying a defendant's offense." 905 F.3d 1231, 1234 (2018). After reviewing this Court's decisions applying the "categorical approach" and culminating in *Dimaya*, see *id.* at 1240-1244, the Eleventh Circuit reasoned that the considerations motivating that approach do not "likewise compel a categorical interpretation of [Section]

924(c)(3)(B)," which instead "can at the very least plausibly be read to bear a conduct-based interpretation." *Id.* at 1244; see *id.* at 1244-1251; see also *id.* at 1253 (W. Pryor, J., concurring) ("How did we ever reach the point where this [c]ourt, sitting en banc, must debate whether a carjacking in which an assailant struck a 13-year-old girl in the mouth with a baseball bat and a cohort fired an AK-47 at her family is a crime of violence? It's nuts.").

Similarly, in *United States* v. *Douglas*, the First Circuit determined that Section 924(c)(3)(B) is not "void for vagueness * * * because the statute reasonably allows for a case-specific approach, considering real-world conduct." 907 F.3d 1, 3 (2018). In doing so, the First Circuit contrasted its decision with the Fifth Circuit's decision in this case. See *id.* at 13. The First Circuit also rejected the same textual argument concerning the phrase "by its nature" that respondents advance here, *id.* at 11, and observed that the categorical approach was "fashioned and refined * * * for practical and constitutional reasons that are specific to the consideration of a prior conviction" and that "do not exist in the distinct context of [Section] 924(c)(3)(B)," *id.* at 13. And the court found that the Hobbs Act robbery conspiracy to which the defendant there pleaded guilty was a crime of violence. See *id.* at 17 (explaining that the conspirators "forced several victims around the house and outside with guns pressed against their heads, threatened to kill a victim multiple times[,] and beat all three victims with a crowbar").

The circuit conflict is unlikely to go away on its own; all indications are that it will instead continue to grow. The issue is currently pending in nearly every other court of appeals, and will soon be pending everywhere. See *United States* v. *Jenkins*, No. 14-2898 (7th Cir. argued

Nov. 2, 2018); *United States* v. *Sims*, No. 15-4640 (4th Cir. argued en banc Sept. 26, 2018); *Knight* v. *United States*, No. 17-6370 (6th Cir. filed Nov. 20, 2017); *United States* v. *McArthur*, No. 17-2300 (8th Cir. filed June 13, 2017); *United States* v. *Begay*, No. 14-10080 (9th Cir. filed Feb. 20, 2014). The Tenth Circuit has already cemented its view that Section 924(c)(3)(B) is unconstitutional by denying en banc review. See Pet. 23-24; see also Gov't Reply Br. at 2-3, *United States* v. *Salas*, No. 18-428 (Dec. 19, 2018) (describing the Tenth Circuit's denial of en banc rehearing and its subsequent decisions treating Section 924(c)(3)(B) as unconstitutional). Contrary to respondents' suggestion (Br. in Opp. 12-13), the government should not have to litigate this question in every circuit, and seek en banc review multiple times in the same circuit, before it can obtain this Court's review of the constitutionality of a frequently invoked and important federal criminal law. The continued confusion in the lower courts—which affects not only current and future prosecutions but ones that are already final as well, see Pet. 24—warrants this Court's immediate intervention.

2. Respondents do not identify any case aside from this one that would give this Court a similarly good opportunity to resolve the question presented this Term. They instead suggest (Br. in Opp. 1-14) that the Court should allow the issue to fester in the lower courts for another year, on the theory that the issue of Section 924(c)(3)(B)'s constitutionality is not squarely presented here. That suggestion is unsound.

a. The court of appeals' only basis for vacating respondents' Section 924(c) convictions was its conclusion that Section 924(c)(3)(B) is unconstitutional. Pet. App. 5a. Were this Court to grant the petition and reverse

that holding, the court of appeals' directive to permanently vacate those convictions, see *id.* at 6a, could not stand. The indictment in this case properly alleged all the elements of a Section 924(c) violation. See Indictment 5 (Count Two); cf. *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999) (elements of a Section 924(c) violation). If, as the government contends and three circuits have held, Section 924(c)(3)(B) employs a case-specific approach in which the jury determines whether the defendant's offense conduct meets the statutory definition, then the only error in this case was a misinstruction of the jury. Such an error would not preclude conviction.

Because omission of an element of the crime from the jury instructions is not structural error, see *Neder* v. *United States*, 527 U.S. 1, 17-19 (1999), respondents would at most be entitled to a new trial. And they would not be entitled even to that, because any error was harmless. The evidence overwhelmingly demonstrates that respondents' conspiracy to rob multiple convenience stores by threatening employees with a short-barreled shotgun "involve[d] a substantial risk that physical force against the person or property of another may be used," 18 U.S.C. 924(c)(3)(B); see Pet. 25-26. Even if the evidence permitted another conclusion, however, the court of appeals' decision, which requires vacatur with no possibility of a new trial, would lack justification if its constitutional holding is wrong.

b. Respondents' assertion of "invited error" (Br. in Opp. 4-8) by the government is mistaken. As the petition acknowledges (Pet. 8, 10), the government had argued before *Dimaya*, in this and other cases, that Section 924(c)(3)(B) should be interpreted to incorporate a categorical approach like Section 16(b)'s. *Dimaya* held

Section 16(b) to be unconstitutionally vague under such an interpretation, with both the plurality and the concurrence attaching significance to the absence of any argument by the government for a different interpretation. See 138 S. Ct. at 1217 (opinion of Kagan, J.); *id.* at 1232-1233 (Gorsuch, J., concurring in part and concurring in the judgment). Accordingly, after *Dimaya*, the government reconsidered whether Section 924(c)(3)(B) should in fact be construed to adopt the categorical approach at issue in *Dimaya*. The government promptly informed this Court of its changed position in a supplemental brief addressing two cases in which it had sought certiorari from pre-*Dimaya* decisions of the Seventh Circuit holding Section 924(c)(3)(B) unconstitutional. See Gov't Supp. Br. at 2-4, *United States* v. *Jenkins*, Nos. 17-97 and 17-651 (Apr. 19, 2018). This Court granted the government's petitions in those cases, vacated the decisions below, and remanded for further consideration in light of *Dimaya*. *United States* v. *Jenkins*, 138 S. Ct. 1980 (2018) (No. 17-97); *United States* v. *Jackson*, 138 S. Ct. 1983 (2018) (No. 17-651).

The Court similarly remanded respondents' petitions in these cases, which also presented the issue of Section 924(c)(3)(B)'s constitutionality. See Pet. 6-10. On remand, the government presented the court of appeals with its current construction of Section 924(c)(3)(B), and the court rejected it, without suggesting that the government had failed to preserve it. Indeed, none of the many courts of appeals to have addressed the question presented has found the government's current construction to be foreclosed on forfeiture or waiver grounds. See, *e.g.*, *Douglas*, 907 F.3d at 7-8 (rejecting waiver argument similar to respondents' and observing that *Dimaya* "shifted the relevant legal landscape" and

that the "government has been forthright about its changed position and the reasons underlying this change"). And if the government's post-*Dimaya* reconsideration of Section 924(c)(3)(B) were preclusive of this Court's review, it would preclude review of *any* case in which the issue arose in the district court pre-*Dimaya*. No sound reason exists to delay, potentially for years, this Court's resolution of a critically important question based on an unsound procedural argument that no appellate court has viewed as an obstacle to merits review.

c. Respondents' pending petitions for rehearing on issues "unrelated to the constitutionality" of Section 924(c)(3)(B) (Br. in Opp. 13) are likewise not a reason to deny certiorari. Irrespective of when or how respondents' petitions for rehearing are resolved, those rehearing petitions have no bearing on this Court's power to review the judgment below. See 28 U.S.C. 1254(1) (certiorari jurisdiction over "[c]ases in the courts of appeals"). Nor, as respondents acknowledge (Br. in Opp. 13), does the substance of those rehearing petitions have any bearing on this Court's review of the merits of the question presented. The only issue presented in the rehearing petitions that relates to Section 924(c)(3)(B) is the scope of a remand in the event that respondents' Section 924(c)(3) convictions are permanently vacated. See *ibid.* If this Court agrees with the court of appeals that such vacatur is required, then either this Court or the court of appeals can address any potential issues about the scope of further proceedings. And if this Court determines that Section 924(c)(3)(B) is constitutional, any lingering dispute about the scope of further proceedings following the current court of appeals decision will become moot.

B. The Court Of Appeals Erred In Invalidating Section 924(c)(3)(B)

As the petition explains (Pet. 12-21), the decision below is incorrect. Section 924(c)(3)(B) defines "crime of violence," for purposes of Section 924(c)'s prohibition on firearms in such crimes, to include any "offense that is a felony * * * that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). Respondents do not dispute that, if that definition is construed to refer to the actual conduct underlying the Section 924(c) prosecution, it is fully constitutional. See Pet. 12. Their defense of the court of appeals' decision to adopt a contrary construction, under which the statute would be invalid, largely repeats that court's errors.

1. Nothing in the text of Section 924(c)(3)(B) itself requires—or would, as a matter of first principles, suggest—that the definition turns on a court's imagining the "ordinary case" of a crime. Respondents focus (Br. in Opp. 14-15) on the phrase "by its nature," but that phrase is naturally read to refer to the nature of the "offender's actual underlying conduct." *Dimaya*, 138 S. Ct. at 1254 (Thomas, J., dissenting); see *Ovalles*, 905 F.3d at 1247 (recognizing that the phrase can refer to the nature of "particular acts" by the defendant); *Barrett*, 903 F.3d at 182 (similar); Pet. 15-16. It limits the inquiry to the offense conduct itself—here, conspiracy to rob a series of convenience stores at gunpoint—rather than the characteristics of the offender. A defendant's self-proclaimed unwillingness to shoot someone does not make a gunpoint robbery nonviolent, cf. Br. in Opp. 10; by the same token, a defendant's history

of assaulting insurance adjusters does not make the fraudulent submission of an insurance claim violent.

Nor is the ordinary-case approach compelled by the term "offense." Br. in Opp. 16-17. This Court has already recognized that the term "offense" can have a case-specific meaning. See Pet. 13-14 (discussing *Nijhawan* v. *Holder*, 557 U.S. 29 (2009), and *United States* v. *Hayes*, 555 U.S. 415 (2009)). That is its most natural meaning in the context of Section 924(c)(3)(B), which refers to "the course of committing the offense." And, contrary to respondents' contention (Br. in Opp. 23), the previous statutory reference to "offense" can be understood the same way. Because the case-specific meaning of the term "offense" encompasses *both* the defendant's acts *and* the law he transgressed, Section 924(c)(3) can define "an offense" as a "crime of violence" when it either has particular conduct "as an element" *or* is "committ[ed]" in a particular way.

2. Unlike the "crime of violence" definition in Section 16(b) that the Court considered in *Dimaya*, Section 924(c)(3)(B) is relevant to the classification only of conduct underlying the current criminal prosecution, and not to prior convictions whose facts may be difficult, or constitutionally problematic, to discern. That "crucial distinction," *Douglas*, 907 F.3d at 13, means that neither practical nor constitutional concerns counsel in favor of an ordinary-case approach, see *id.* at 14; *Ovalles*, 905 F.3d at 1249-1250; *Barrett*, 903 F.3d at 181-182. To the contrary, in the particular context of Section 924(c)(3)(B), the canon of constitutional avoidance favors a case-specific approach. See Pet. 19-21.

Before *Dimaya*, it was reasonable to presume, as the government itself did, that Section 924(c)(3)(B) should be interpreted congruently with Section 16(b). But that

assumption should not result in the invalidation of the statute. If anything, by enacting a subsection-specific definition of "crime of violence" in Section 924(c)(3) rather than relying on the definition in Section 16(b), Congress signaled that the statutes need not be read identically. Respondents identify nothing in the legislative history (Br. in Opp. 18-19) or congressional silence (*id.* at 19-21) to indicate that Congress in 1986 specifically intended Section 924(c)(3)(B) to adopt the ordinary-case categorical approach. See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(F), 100 Stat. 457. This Court did not embrace the categorical approach for any purpose until 1990, see *Taylor* v. *United States*, 495 U.S. 575, 600-602; did not embrace an ordinary-case categorical approach until 2007, see *James* v. *United States*, 550 U.S. 192, 208, overruled by *Johnson* v. *United States*, 135 S. Ct. 2551 (2015); and has never embraced any form of the statutory categorical approach outside the context of a statute that can be applied to classify prior convictions. Particularly now that *Dimaya* has invalidated a statute in light of that approach, Congress cannot be presumed to have desired it.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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